No. 92-8579

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In the Supreme Court of the United States

OCTOBER TERM, 1993

CHARLES K. ELDER, PETITIONER

v.

R. D. HOLLOWAY, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an appellate court evaluating an immunity defense in an action under 42 U.S.C. § 1983 may consider only the legal authorities cited to the district court -- and must ignore relevant precedents cited for the first time on appeal or disclosed by the court's own research -- in deciding whether the constitutional right allegedly violated by the defendant was "clearly established."

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. Since its founding, the ACLU has been particularly concerned with the ability of individuals to obtain redress for violations of their federal constitutional rights. The ACLU has, therefore,

appeared before this Court in numerous cases concerning the scope of the federal civil rights laws, both as counsel for parties and as amicus curiae.

This Court has held that government officials sued under 42 U.S.C. § 1983 are divested of their qualified immunity from damages liability if they are shown to have violated clearly established constitutional rights. The present case brings before the Court an important question regarding the procedural rules governing civil rights plaintiffs' challenges to state officials' qualified immunity defenses. The rule adopted by the Ninth Circuit bars appellate courts from considering cases other than those cited to the district court in evaluating the defendant's entitlement to immunity. That approach, if upheld by this Court, would raise the distinct possibility that the success of a plaintiff's Section 1983 claim would be measured more by the abilities of that plaintiff's lawyer than by the relevant law, and would allow government defendants to avoid liability for unconstitutional acts that violate clearly established law.[1]

STATEMENT

Respondents, all of whom are police officers employed by the Ada County Sheriff's Office, arrested petitioner without a warrant on the porch of the house in which petitioner was living.[2] Petitioner subsequently commenced this action under 42 U.S.C. § 1983 seeking damages on the ground that the arrest on his porch constituted a constructive entry of his home without a warrant, and therefore violated his Fourth Amendment rights. *Elder* v. *Holloway*, 975 F.2d 1388, 1390 (9th Cir. 1992), cert. granted, No. 92-8579.

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[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court pursuant to Sup. Ct. R. 37.3.

[2] Petitioner was wanted in the State of Florida.

Respondents filed a motion for summary judgment claiming immunity from liability for damages on the ground that their conduct did not violate any "clearly established" constitutional rights of petitioner. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In response, petitioner proffered three cases to demonstrate that the law regarding constructive entries had been clearly established at the time of his arrest, and that respondents' actions had in fact constituted such an entry.

The district court granted respondents' motion for summary judgment, holding that "the law is not clear--in fact, the court has found no controlling Idaho or Ninth Circuit case law--on the issue." Pet. App. C at 21. The court found that respondents therefore had not violated petitioner's clearly established rights by making the arrest on his porch. *Id.* at 21-22.

The court of appeals affirmed. It agreed with the district court that none of the cases cited by petitioner established that an arrest in circumstances such as those in this case violated the Fourth Amendment. 975 F.2d at 1391.

The court observed, however, that a Ninth Circuit case not cited by petitioner and not considered by the district court -- *United States* v. *Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986) -- might point toward a different result. 975 F.2d at 1391. The court nevertheless declined to consider that decision on the ground that "'[t]he plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct.'" *Id.* at 1392 (citation omitted). In fulfilling that burden, the court concluded, a Section 1983 plaintiff is responsible for "identify[ing] the universe of statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established." 975 F.2d at 1393. Because petitioner failed to bring the *Al-Azzawy* decision to the attention of the district court, the court

of appeals determined it could not consider the case. 975 F.2d at 1393-1395.[3]

SUMMARY OF ARGUMENT

The disposition of this case by the court of appeals is truly remarkable. In the course of deciding what the court acknowledged to be a question of law -- whether the constitutional rights allegedly violated by respondents were clearly established at the time of the conduct in question -- the court refused to consider one of its own precedents on the ground that the decision had not been cited to the district court. The court went on to hold that petitioner's claim was barred by qualified immunity. In the court of appeals' view, the excluded precedent could not influence its deliberations, *even if that precedent established beyond any doubt that the constitutional right invoked by petitioner was clearly established and that respondents therefore should not have been accorded immunity from damages liability*. That novel limitation on the power of a court to resolve questions of law has no basis in precedent or common sense.

First, it is well settled that appellate courts may base their decisions regarding questions of law on authorities not cited to the district court. Indeed, appellate courts may, and

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[3] Although the court of appeals panel suggested in its amended opinion that even if it were to consider *Al-Azzawy*, the decision would not be determinative of the constructive entry issue (975 F.2d at 1396), Judge Kozinski dissented, agreeing with the panel's initial conclusion that the case "applies directly to the claim of qualified immunity raised by the defendants here" (984 F.2d 991, 992 n.1 (9th Cir. 1993) (dissent from denial of rehearing en banc)). He observed that "if *Al-Azzawy* did not change the legal landscape enough to defeat a claim of qualified immunity, it would have been far simpler to dispose of the case on that basis." *Ibid.*

frequently do, rely on authorities -- or entire legal theories -- never mentioned by the parties at all.

Second, this Court has made clear that the qualified immunity inquiry -- whether the defendant violated clearly established rights of the plaintiff -- is "a question of law." *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985). Indeed, the Court has emphasized that it is a "purely legal" issue. *Id.* at 528 n.9. For that reason, a court should treat the immunity question like any other question of law and determine the proper answer for itself by looking to any relevant authority it can discover.

Third, contrary to the Ninth Circuit's apparent belief, this Court has never endorsed the arbitrary limitation on the immunity inquiry formulated in this case. By stating that a plaintiff may overcome a qualified immunity defense "only by showing that those rights [violated by the defendant] were clearly established at the time of the conduct at issue" (*Davis* v. *Scherer*, 468 U.S. 183, 197 (1984)), the Court did not mean to limit the legal authorities that could be consulted by the appellate court. The phrase in *Davis* means simply that the plaintiff may prevail only if he convinces the court that his claim is well-grounded in law. The plaintiff must, of course, put forward legal arguments directed toward that end, but the court remains free to look to other authorities in resolving the legal issues.

Fourth, there is no policy justification for the Ninth Circuit's novel rule. Rather, the effect of this "justice with blinders" approach would be to diminish respect for the legal system, making the outcome of a case dependent more on the skill of the attorneys involved than on the merits of the claims. It also would reduce the deterrent effect of the Section 1983 remedy, because government officials who violate clearly established rights will not be required to answer in damages. This Court should reject the Ninth Circuit's approach and reaffirm that courts have unfettered authority to

determine what the law is in this area, as they do with respect to every other issue of law that comes before them.

ARGUMENT

AN APPELLATE COURT MAY NOT IGNORE RELEVANT LEGAL AUTHORITIES IN DETERMINING WHETHER A SECTION 1983 DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY

This Court has recognized that "[w]hen government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982)). Indeed, the Reconstruction-era statute now codified at 42 U.S.C. § 1983 was enacted "to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen* v. *City of Independence*, 445 U.S. 622, 650 (1980) (citations and internal quotation marks omitted). Because the damages remedy accomplishes both compensation and deterrence, it is "a vital component of [the] * * * scheme for vindicating cherished constitutional guarantees." *Id.* at 651.

The Court has also observed, however, that "permitting damages suits against government officials can entail substantial social costs" (*Anderson*, 483 U.S. at 638), and has "accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity." *Ibid.*[4] Specifically,

[4] In certain limited circumstances, narrow categories of government officials, such as judges and legislators, are protected by an unqualified immunity for their official acts. See, *e.g.*, *Stump* v. *Sparkman*, 435 U.S. 349, 356 (1978) (judicial immunity).

the Court has held that government officials may be held liable in damages only when their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

The question in this case relates to the procedure courts should use in determining whether the constitutional right invoked by the plaintiff was "clearly established" at the time the allegedly unlawful conduct occurred. According to the Ninth Circuit, the plaintiff's arguments regarding that question amount to "legal facts" and neither the court of appeals nor this Court may look beyond the authorities contained in those arguments to ascertain the state of the law at the time of the events in question.

We submit that the Ninth Circuit's approach is manifestly wrong. It is well settled that courts are not restricted to the submissions of the parties in resolving questions of law, and this Court has clearly stated that whether a particular legal rule was "clearly established" is a question of law. Moreover, all relevant policy considerations weigh strongly in favor of permitting courts to exercise their traditional independence in resolving the questions of law involved in an immunity dispute.

A. This Court's Precedents Leave No Doubt That A Court Is Not Restricted To The Parties' Presentation In Deciding Whether A Particular Legal Rule Was Clearly Established.

The answer to the procedural question addressed by the court of appeals is dictated by two propositions that are so well settled as to be beyond dispute. The first is that in resolving a question of law, a court may consider any authority that it deems relevant, whether or not that authority was brought to its attention by the parties. The second is that the determination whether a legal rule was clearly established, and therefore whether the defendant government official is

entitled to immunity from damages liability, is a question of law to be decided by the court. For that reason, the trial court -- and any appellate courts reviewing the case -- may examine all authorities they deem relevant in resolving the matter.

1. Courts May Consider Authorities Not Cited By The Parties In Resolving Disputes Regarding Questions Of Law.

The "appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985); see also *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1982) (referring to the "vexing nature of the distinction between questions of fact and questions of law"). But much effort has been devoted to distinguishing the two types of issues precisely because the distinction, once made, carries great significance: the nature and extent of the appellate court's power of review differs sharply depending upon whether the issue is one of law or one of fact.

Decisions of fact are subject to deferential review (see, *e.g.*, Fed. R. Civ. P. 52(a)) and the appellate court is generally confined to the record developed by the parties in the court below. See 9 C. Wright & A. Miller, Federal Practice and Procedure § 2583, at 725 (1971) ("a court of appeals will consider only those findings of fact * * * that are signed by the trial judge and filed as part of the record on appeal").

With respect to issues of law, however, the appellate court exercises considerably more leeway. Its review is *de novo*. See *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). And, in exercising its *de novo* review, the court is not limited to the legal authorities presented by the parties. It may "resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and

satisfactory answer to such question[s]." *Gardner* v. *The Collector*, 73 U.S. (6 Wall.) 499, 511 (1868).

That rule is reflected in this Court's repeated recognition that federal courts must consider all relevant law regardless of whether the parties have presented such authority to the court. See *Lamar* v. *Micou*, 114 U.S. 218, 223 (1885) ("[t]he law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof"); accord *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U.S. 397, 445 (1889); *Hanley* v. *Donoghue*, 116 U.S. 1, 6 (1885); *Owings* v. *Hull*, 34 U.S. (9 Pet.) 607, 624-625 (1835); *Schultz* v. *Tecumseh Prods.*, 310 F.2d 426, 433 (6th Cir. 1962) ("counsel's failure to cite law of which a United States Court must take judicial notice, and which controls the disposition of the case, does not render such law inapplicable or prevent reliance upon it on appeal").

Certainly this Court and the federal courts of appeals routinely rely upon authorities not cited by the parties; indeed, upon entire legal theories not advanced by the parties. Outlawing that practice would obstruct the orderly development of the law by requiring courts to base their rulings on an artificially circumscribed universe of precedent. "It would be an intolerable state of things if a * * * [particular judicial opinion] could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another." *Town of South Ottawa* v. *Perkins*, 94 U.S. 260, 267 (1877).

In sum, restricting courts to considering only those cases that the parties have "proved" would infringe the courts' "independent power to identify and apply the proper construction of governing law." *United States Nat'l Bank of Oregon* v. *Independent Insurance Agents*, 113 S. Ct. 2173,

2178 (1993) (quoting *Kamen* v. *Kemper Financial Servs., Inc.*, 111 S. Ct. 1711, 1718 (1991)). As long as "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *Kamen*, 111 S. Ct. at 1718.

2. Whether A Section 1983 Defendant Is Entitled To Immunity From Damages On The Ground That The Plaintiff's Legal Right Was Not Clearly Established Is A Question Of Law.

This Court has recognized many times that determining whether the defendant violated "clearly established" law is a question of law to be resolved by the trial court. In the decision that first announced that immunity standard -- *Harlow* v. *Fitzgerald*, *supra* -- the Court observed that "[o]n summary judgment, *the judge appropriately may determine*, not only the currently applicable law, but *whether that law was clearly established at the time an action occurred*." 457 U.S. at 818 (emphasis added).

Three years later, in holding that a district court's denial of qualified immunity is immediately appealable, the Court observed that the immunity determination turns "on the resolution of the *essentially legal question* whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell*, 472 U.S. at 526 (emphasis added). The Court went on to characterize that issue as "a question of law"; indeed, the Court emphasized that it is a "purely legal" issue. *Id.* at 528 n.9. Accord, *Hunter* v. *Bryant*, 112 S. Ct. 534, 537 (1991); *Siegert* v. *Gilley*, 111 S. Ct. 1789, 1793 (1991); see also Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 8.16, at 511 (2d ed. 1986) ("whether clearly settled

law existed at the time a defendant acted is an issue of law for the court").[5]

Not surprisingly, the lower courts have followed this Court's directive. Even the Ninth Circuit recognized in its decision in this case that "'[t]he determination of whether [a] right was so clearly established as to alert a reasonable officer to its constitutional parameters' presents a 'pure question of law.'" 975 F.2d at 1392 (quoting *Romero* v. *Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991)). See also *Dominique* v. *Telb*, 831 F.2d 673, 676 (6th Cir. 1987) (the court "must decide the *purely legal question* of whether the law at the time of the alleged action was clearly established in favor of the plaintiff") (emphasis added); *Dixon* v. *Richer*, 922 F.2d 1456, 1460 (10th Cir. 1991) (because "[t]he claim of qualified immunity presents a question of law[,] the court cannot avoid the question by framing it as a factual issue") (citation omitted).

Because the determination whether the official violated clearly established law is itself a question of law, courts are entitled to look beyond the submissions of the parties in resolving that question. In this context, as with any other question of law, "[t]hat which purports to be a law * * * is a law, or it is not a law, according as the truth of the fact

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[5] As the Court observed in *Anderson* v. *Creighton*, *supra*, the determination whether a government official is entitled to immunity may involve a fact-specific inquiry. That is especially true where -- as in *Anderson* and in the present case -- the official is alleged to have violated the Fourth Amendment. 483 U.S. at 641. But the ultimate question is still one of law: "whether a reasonable officer could have believed [the official's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Ibid.*

may be, and not according to the shifting circumstances of parties." *Town of South Ottawa*, 94 U.S. at 267.

3. The Justifications Advanced By The Ninth Circuit For Its Contrary Approach Do Not Withstand Scrutiny.

The Ninth Circuit relied on two factors in concluding that it could consider only those legal authorities cited to the district court. First, it invoked this Court's decision in *Davis* v. *Scherer*, 468 U.S. 183 (1984); second, it pointed to alleged differences between the inquiry into clearly established law and other legal questions. Neither factor provides a shred of support for the Ninth Circuit's approach.

This Court stated in *Davis* that a plaintiff may overcome a qualified immunity defense "only by showing that those rights [violated by the defendant] were clearly established at the time of the conduct at issue." *Id.* at 197. Characterizing this phrase as imposing a "burden of proof" on the civil rights plaintiff to demonstrate a violation of clearly established law, the Ninth Circuit asserted that "[r]equiring the plaintiff to identify the universe of authority that is relevant to the fact-specific right allegedly violated follows naturally from this direction." 975 F.2d at 1393.

But this Court's statement in *Davis* had nothing whatever to do with burdens of proof. It simply reiterated the legal standard regarding immunity that the Court enunciated in *Harlow*: government officials are entitled to immunity unless the court determines that the constitutional rights in question were clearly established. Just as the plaintiff must "show" that the facts alleged in the complaint make out a violation of the plaintiff's constitutional rights, the plaintiff also must "show" that those rights were clearly established.

Had this Court intended to distinguish the qualified immunity inquiry from other questions of law, it surely would have spoken with greater clarity. The phrase in *Davis*

provides no indication that the Court was subjecting civil rights plaintiffs to the extraordinary burden -- unknown in any other area of the law -- of putting before the court all authorities relevant to this legal determination. Similarly, the opinion contains no hint that the Court meant to circumscribe appellate courts' traditional authority to consider materials uncovered through their own research in deciding questions of law.

Properly understood, therefore, the phrase in *Davis* means simply that the plaintiff may prevail only if he establishes that his claim is well-grounded in law. As with other questions of law, the plaintiff is expected to put forward arguments in support of his position. However, as with other questions of law, the court remains free to look to other authorities in resolving the legal issues.

The Ninth Circuit also sought to distinguish the inquiry at issue here from other legal questions, contending that "declar[ing] what the law is" differs from "determining what the law with respect to an alleged constitutional right was, and how clear it was." 975 F.2d at 1394. Although the two types of inquiries plainly differ to some degree (the latter is backward looking, while the former is not), the court of appeals did not explain why that difference would justify forcing appellate courts to put on blinders when addressing the defendant's entitlement to immunity. We can think of no reason for such a severe limitation.

Indeed, there are a number of other contexts in which courts must make determinations about what the law was. Under *Teague* v. *Lane*, 489 U.S. 288, 310 (1989) (plurality opinion), only "new" constitutional rules apply retroactively to criminal cases on collateral review; the court accordingly must determine whether or not the rule advocated by the defendant would qualify as "new" when viewed against past precedent. Similarly, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), the Court determined whether a decision

should be applied retroactively by considering if it "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (citation omitted).[6] And no one has ever suggested that courts deciding these issues are limited to cases cited by the parties, with the result that a rule may be held to be "new" under *Teague* with respect to a defendant in one case but not with respect to defendants in other cases.[7]

In sum, there is no basis for distinguishing the immunity inquiry from any other question of law. Courts should be free to consider the results of their own investigations into the relevant caselaw in ruling on those questions.

B. The Ninth Circuit Rule Should Be Rejected Because It Would Distort The Judicial Process.

The Ninth Circuit's approach is not merely unsound as a matter of precedent; it also is quite unsound as a matter of policy. First, the court of appeals' approach appears to rest

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[6] The Court's determination in *Harper* v. *Virginia Dep't of Taxation*, 61 U.S.L.W. 4664 (U.S. June 18, 1993) (No. 91-794), that *Chevron* may not in some circumstances supply the proper standard for determining whether a decision should be applied retroactively does not undercut the point here: when the Court has applied the *Chevron* test it has not distinguished the legal questions that arise under that standard from other questions of law.

[7] The court of appeals suggested (975 F.2d at 1395) that its approach was analogous to an appellate court's refusal to consider a challenge to jury instructions as to which there was no objection or invited error. But Federal Rule of Civil Procedure 51 expressly requires objection in order to preserve instructional error for appeal. There is no similar rule governing the question of immunity in Section 1983 cases.

upon a "sporting" theory of legal advocacy that is especially inappropriate in the context of Section 1983, a statute that is remedial in nature and is designed to aid in the "'preservation of human liberty and human rights.'" *Owen* v. *City of Independence*, 445 U.S. at 636 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger)). The Ninth Circuit rule would make the outcome of a case dependent more on the skill of the attorneys involved than on the merits of the claims. No longer could an appellate judge supplement counsel's inadequate investigation of the governing law. Thus, claims asserted by two similarly situated plaintiffs might well meet different fates, with the only difference being the skill of the lawyers.

The burden of such a rule is likely to fall more heavily on plaintiffs than defendants. Typically, plaintiffs have fewer legal resources at their disposal than do the government officials who are defendants in Section 1983 cases. (Indeed, in many cases defendants' counsel are paid by the government entity that employs the defendant.) That is why Congress found it necessary to provide the incentive of an award of attorneys' fees in successful Section 1983 cases. See 42 U.S.C. § 1988; S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3 (1976). And plaintiffs rely more heavily on case law than defendants in qualified immunity cases -- the only way a plaintiff can defeat a qualified immunity defense is by demonstrating that clearly established law exists.[8]

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[8] As Judge Kozinski noted, however, "[t]he chaotic effects of the * * * [Ninth Circuit] rule will not be visited solely on plaintiffs." 984 F.2d at 998 (dissenting from denial of rehearing en banc). If a defendant fails to cite a decision revealing a split in authority, the appellate court "would be powerless to reverse the unjust imposition of liability on a government officer." *Ibid.*

The Ninth Circuit's approach would thus produce a procedure that is precisely the opposite of our ideal of a judicial system that metes out justice on the basis of merit of the legal claim. While it is an unfortunate truth that resources may make a difference in the outcome of a case, the Ninth Circuit's rule would further exacerbate that problem without providing any countervailing benefit.

Second, the conflicting results that would be the inevitable byproduct of the Ninth Circuit's approach would lead to a waste of judicial resources and a diminution in respect for the courts. Qualified immunity decisions would no longer form a coherent body of precedent because "[e]very qualified immunity decision will be limited to its particular 'facts,' a term now defined to include" the cases cited by the parties. 984 F.2d at 999 (Kozinski, J., dissenting from denial of rehearing en banc). A subsequent action involving the same legal question would have to be decided without reference to the prior opinion if different precedents were cited before the district court. And the inconsistent results -- virtually impossible to explain to a public that expects "the law" to have one consistent meaning -- would diminish public confidence in the courts.

Third, Section 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen*, 445 U.S. at 651. Society therefore has a strong interest in ensuring that immunity is not erroneously granted to officials who violate clearly established rights; to the contrary, damages are necessary in such cases in order to deter future wrongdoing. By shifting the immunity inquiry away from the actual body of law governing a particular topic, and to the limited group of precedents that a civil rights plaintiff is able to discover on his own, the Ninth Circuit's approach significantly increases the chances of erroneous immunity decisions. That, in turn, means that defendants who should be subjected to damages liability will instead

obtain immunity. A system that fails to punish wrongdoers will obviously have a diminished deterrent effect. Even more egregiously, this lessened deterrence is not balanced by *any* corresponding benefit.

In sum, all of the relevant policy considerations favor reaffirmation of the courts' plenary authority to decide questions of law.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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